

KEYWORD: Guideline F

DIGEST: Applicant’s argument for a different interpretation of the evidence was not sufficient to demonstrate that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASE NO: 10-01673.a1

DATE: 06/04/2012

DATE: June 4, 2012

In Re:)	
)	
-----)	ISCR Case No. 10-01673
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 8, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 29, 2012, after the hearing, Administrative Judge Edward W. Loughran denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge’s unfavorable security clearance decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board

affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings of fact: Applicant is 42 years old. He has had financial issues for a number of years. He had federal tax liens filed against him in 2002, 2003, and 2005. Applicant paid his taxes and the liens were released in 2008. He lost his house to foreclosure in 2004. Applicant has been steadily employed for about ten years, but he injured his back while working in 2009. He was laid off for four to six months. He received workers' compensation, but it was less than his normal income. Applicant's wife lost her job in 2009. She is still unemployed.

The SOR alleges 12 delinquent debts with balances totaling about \$18,900. Applicant denied owing all the debts. He indicated some of the debts had been paid, some were not incurred by him, and some he felt should not be his responsibility. To date, Applicant's unpaid debts include a \$430 telephone bill, a \$568 utility bill, a \$7,590 car note, a \$5,869 truck note, and a \$1,358 communications services debt. The \$5,869 debt appears to be the subject of a settlement agreement with the creditor, but there is no evidence of repayment. Applicant retained a company in about August 2011 to assist him in disputing items on his credit report. Applicant stated that his finances are currently in better shape. He moved to a different shift that permits him to work more overtime. The company that is helping him correct his credit also provided him financial counseling. He stated that he is able to pay his current debts without incurring additional delinquent debts.

The Judge reached the following conclusions: Applicant accumulated a number of delinquent debts and was unable or unwilling to pay his financial obligations. Applicant injured his back in 2009 and was off work for four to six months. His wife lost her job in about 2009 and is still unemployed. Those events qualify as conditions that were outside of his control. To be fully applicable, AG ¶ 20(b)¹ also requires that the individual act responsibly under the circumstances. Applicant had financial issues before his family's employment problems. Applicant is credited with paying his federal taxes. He is also credited with making a \$3,000 payment as part of the settlement of the deficiency owed on his car loan after he returned the car to the finance company. Applicant did not establish that he made the \$3,000 payment until after the record was reopened. He also did not establish that he started monthly payments on his other payment agreement. There is no convincing evidence that Applicant will maintain either payment once he is no longer under the threat of the denial of his security clearance. Applicant has received financial counseling, establishing the first section of AG ¶ 20(c).² However, it cannot be concluded that Applicant acted responsibly under the circumstances and made a good-faith effort to pay his debts. His finances are not yet under control. His financial issues are recent and ongoing, and it cannot be determined that they are unlikely to recur. Financial concerns remain despite the presence of some mitigation. Under the whole-person concept, Applicant's favorable character evidence is noted. However, Applicant has not demonstrated that his finances are sufficiently in order to warrant a security clearance.

¹“[T]he conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances[.]”

²“[T]he person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control[.]”

Applicant argues that the Judge's decision failed to examine relevant evidence, did not articulate a rational connection between the facts found and the choices made, and reflects a clear error of judgment as it offers an explanation that runs contrary to the evidence.

Applicant cites the fact that the Judge did not include in his findings the fact that Applicant's monthly income since April 2011 has increased from \$2,968 to anywhere from \$6,500 to \$7,000 per month. Applicant argues that his drastic increase in income plays a significant role in his ability to maintain his financial stability. A judge is not required to discuss each and every piece of record evidence in making a decision. *See* ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007). The fact that the Judge did not specifically reference the salary numbers testified to by Applicant does not indicate error. The Judge did make reference to the fact that Applicant's finances were currently in better shape owing to a situation where he was able to work more overtime. Thus, the Judge recognized the fact that Applicant's income was increasing and that his financial circumstances had changed.

Applicant argues that the Judge's decision did not adequately take into consideration the fact that Applicant has and is acting responsibly toward his debts. He lists a number of factors that arguably indicate some responsible action toward his financial situation, such as obtaining counseling, contacting credit bureaus to dispute debts, and the establishment of payment plans. However, the mere presence of some evidence in mitigation does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). In his decision, the Judge acknowledged several matters in mitigation, and concluded that two of the Guideline F mitigating conditions partially applied. However, the Judge also noted such matters as the fact that Applicant had experienced significant financial difficulties prior to his injury and his wife's unemployment. These took the form of numerous tax liens and a house foreclosure. He also noted that Applicant did not address the deficiency on a car loan until after the hearing in the case had taken place. The Judge indicated that Applicant had not established that he had started the monthly payments pursuant to another payment plan. The Judge concluded that this state of affairs fell short of establishing responsible conduct on Applicant's part and left doubts as to whether Applicant's finances were under control. That conclusion is sustainable on this record.

A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). Applicant's appeal brief essentially argues for an alternate interpretation of the record evidence. The Board concludes that the Judge appropriately weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and adequately discussed why the disqualifying conduct established under Guideline F was not mitigated.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for

his decision, “including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). “The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Therefore, the Judge’s ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Jeffrey D. Billett _____
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin _____
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Singed: William S. Fields _____
William S. Fields
Administrative Judge
Member, Appeal Board